

HAND DELIVERED

274 South Main Street
Apartment 36B
Providence, Rhode Island 029

September 20, 2013

Kent Willever
Executive Director
Rhode Island Ethics Commission
40 Fountain Street, 8th floor
Providence, RI 02903

Re: Request for Advisory Opinion

Dear Mr. Willever:

I am writing pursuant to R.I. Gen. Laws § 36-14-11 and Rhode Island Ethics Commission Regulation 1024, to request an advisory opinion.

I am the Director of the Department of Administration for the State of Rhode Island ("DOA"), a position I have held since January 2011. I am considering applying to the Judicial Nominating Commission with respect to the current vacancy in the Rhode Island Superior Court. The question on which an advisory opinion is sought is as follows:

Whether the position of DOA Director is "a senior-policy making, discretionary, or confidential position on the staff of any state elected official," for purposes of R.I. Gen. Laws § 36-14-5(o)?

The Rhode Island Code of Ethics' so-called "Revolving Door Statute" provides that "[n]o person holding a senior policy-making, discretionary, or confidential position on the staff of any state elected official . . . shall seek or accept any other employment by any state agency as defined in § 36-14-2(8)(i), while serving as such policy-making, discretionary, or confidential staff member and for a period of one year after leaving that state employment as a member of the state elected official's . . . senior policy making, discretionary, or confidential staff." R.I. Gen. Laws § 36-14-5(o).

Although the Code of Ethics does not define those positions that constitute "a senior policy-making, discretionary, or confidential position on the staff of any state elected official," I write to confirm my understanding that the DOA Director is not "a senior policy-making, discretionary, or confidential position on the staff of any state elected official" for purposes of R.I. Gen. Laws § 36-14-5(o).

By way of background, the position of DOA Director is a position created by statute. Pursuant to R.I. Gen. Laws § 42-6-2, the DOA Director “shall hold office at the pleasure of the governor and he or she shall serve until his or her successor is duly appointed and qualified unless the director is removed from office by special order of the governor.” Unlike members of the staff of state elected officials who are appointed by the elected official without any required approval by anyone else, the DOA Director is appointed by the Governor, but is subject to the advice and consent of the Senate. R.I. Gen. Laws § 42-6-3.

In addition to the fact that the process for appointment of the DOA Director is distinct from the process for appointment for members of the staff of state elected officials, another section of the Code of Ethics draws a distinction between “department directors,” such as the DOA Director, and those holding a position as “a senior policy-making, discretionary, or confidential position on the staff of any state elected official.”

Subsection (o)(3) of the Revolving Door Statute provides: “Nothing contained herein shall prohibit any general officer . . . from appointing *any such senior policy-making, discretionary, or confidential member of the staff of any state elected official . . . to any other senior policymaking, discretionary, or confidential position on any general officer’s . . . staff, and in the case of the governor, to a position as a department director.*” (emphasis added). Thus, subsection (o)(3) makes a clear distinction between “a senior policy-making, discretionary, or confidential position on the staff of any state elected official” and “a department director.” A similar distinction is made in subsection (n)(2).

When construing a statute, the Rhode Island Supreme Court endeavors “‘to give effect to the purpose of the act as intended by the Legislature.’” *State v. Hazard*, 68 A.3d 479, 485 (R.I. 2013) (quoting *Alessi v. Bowen Court Condominium*, 44 A.3d 736, 740 (R.I. 2012)). To that end, “[w]hen the language of the statute is clear and unambiguous, [the] Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Id.* Nevertheless, the Rhode Island Supreme Court has cautioned “the plain meaning approach must not be confused with ‘myopic literalism.’” *Id.* Thus, “even when confronted with a clear and unambiguous statutory provision” the Court may “look to the sense and meaning fairly deducible from the context.” *Id.* Therefore, it is well-settled that when construing a statute, the Court must “consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.” *Id.*

Here, when considering the Revolving Door Statute as a whole and reading individual subsections in the context of the entire statute, it is clear that the legislature intended to draw a distinction between department directors, such as the DOA Director, and those who hold a position as a “senior policy-making, discretionary, or confidential member of the staff of any state elected official.” Indeed, unless there was such a distinction, the language in Subsection (o)(3) would be superfluous.

Additionally, because the Revolving Door Statute limits those who may seek appointment and/or employment, it is, in effect, in the nature of a penal statute, which

must be strictly construed. See *Gemma v. Rhode Island Ethics Commission*, C.A. No. 94-3404, 1994 R.I. Super. LEXIS 105 (R.I. Super. Ct. 1994). Therefore, any doubts as to whether department directors are distinct from those who hold a position as a "senior policy-making, discretionary, or confidential member of the staff of any state elected official" must be resolved in favor of the party subject to the statute's restrictions. See *Bassett v. DeRentis*, 446 A.2d 763, 764-65 (R.I. 1982); see also *State v. Oliveira*, 882 A.2d 921, 925 (R.I. 1980). Consequently, if the Commission has any doubt as to whether department directors are distinct from those who hold a position as a "senior policy-making, discretionary, or confidential member of the staff of any state elected official," it should strictly construe the statute and determine that department directors are not subject to the Revolving Door Statute.

Finally, even apart from distinction drawn by the legislature between department directors and those who hold a position as a "senior policy-making, discretionary, or confidential member of the staff of any state elected official," in fact and in practice, there is also a significant distinction. For example, while the Governor regularly holds senior staff meetings, department directors are not invited to attend, nor do they attend such meetings. Additionally, the powers and responsibilities of Directors are set by statute whereas the Governor determines the assignments and responsibilities of senior staff.

Based on the foregoing, I respectfully request that the Ethics Commission confirm that the position of DOA is not "a senior-policy making, discretionary, or confidential position on the staff of any state elected official," for purposes of R.I. Gen. Laws § 36-14-5(o).

Thank you for your consideration.

If you need any additional information, I may be reached at rlicht325@gmail.com or my office 401-222-2280.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard A. Licht". The signature is fluid and cursive, with a large initial "R" and a stylized "L".

RICHARD A. LICHT